09-3925-cv(L)

10-0214-cv(CON), 10-1612-cv(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-3925-cv(L),
10-0214-cv(CON), 10-1612-cv(CON)

FIGUEIREDO FERRAZ E ENGENHARIA DE PROJETO LTDA.,

Plaintiff-Appellee,

—v.—

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF VACATUR AND REMAND

TONY WEST,
Assistant Attorney General

DOUGLAS N. LETTER,
LEWIS S. YELIN,
Attorneys, Appellate Staff
Civil Division
Department of Justice

HAROLD HONGJU KOH,
Legal Adviser,
Department of State

PREET BHARARA,
United States Attorney for the Southern District of New York,
Attorney for the United States of America as Amicus Curiae
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-6559

AMY A. BARCELO,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys

THE REPUBLIC OF PERU, MINISTERIO DE VIVIENDA, CONSTRUCCION Y SANEAMIENTO, PROGRAMA AGUA PARATODOS (PAPT) (successor by integration to Programa De Apoyo A La Reforma Del Sector Saneamiento (PARASSA), formerly known as Proyecto Especial Programa Nacional De Agua Potable & Alcantarillado (PRONAP)),

Defendants-Appellants,

THE REPUBLIC OF PERU AND THE MINISTRY OF HOUSING, CONSTRUCTION AND CLEAN-UP OF THE REPUBLIC OF PERU, PROGRAMA AGUA PARA TODOS, formerly known as Proyecto Especial Programa Nacional de Agua Potable Y Alcantarillado (PRONAP), formerly known as Programa De Apoyo a la Reforma Del Sector Sanaemiento (PARASSA),

Defendants.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

PAGE

Legislative History:

International Conventions:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3925-cv(L),
10-0214-cv(con), 10-1612-cv(con)

FIGUEIREDO FERRAZ E ENGENHARIA DE PROJETO LTDA.,

Plaintiff-Appellee,

—v.—

THE REPUBLIC OF PERU, MINISTERIO DE VIVIENDA, CONSTRUCCION Y SANEAMIENTO, PROGRAMA AGUA PARA TODOS (PAPT) (SUCCESSOR BY INTEGRATION TO PROGRAMA DE APOYO A LA REFORMA DEL SECTOR SANEAMIENTO (PARASSA), FORMERLY KNOWN AS PROYECTO ESPECIAL PROGRAMA NACIONAL DE AGUA POTABLE & ALCANTARILLADO (PRONAP)),

Defendants-Appellants,

THE REPUBLIC OF PERU AND THE MINISTRY OF HOUSING, CONSTRUCTION AND CLEAN-UP OF THE REPUBLIC OF PERU, PROGRAMA AGUA PARA TODOS, FORMERLY KNOWN AS PROYECTO ESPECIAL PROGRAMA NACIONAL DE AGUA POTABLE Y ALCANTARILLADO (PRONAP), FORMERLY KNOWN AS PROGRAMA DE APOYO A LA REFORMA DEL SECTOR SANAEMIENTO (PARASSA),

Defendants.

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF VACATUR AND REMAND

Interest of the United States

By invitation of this Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this brief as amicus curiae.

Defendants-appellants—the Republic of Peru, the Peruvian Ministry of Housing, Construction, and Sanitation ("the Ministry"), and an Executive Unit established under the Ministry known as the Water for Everyone Program ("the Program")—appeal from the district court's denial of their motion to dismiss this suit for lack of subject matter jurisdiction, for failure to state a claim, for lack of personal jurisdiction, and pursuant to the doctrine of *forum non conveniens* or for reasons of international comity. Plaintiff-appellee Figueiredo Ferraz Consultoria E Engenharia De Projeto LTDA, an engineering firm incorporated and headquartered in Brazil, brought this suit to confirm and enforce against all three defendants an arbitral award entered in Peru against only the Program. Figueiredo asserted jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1447(d), 1602-1611. (JA 24 (citing 28 U.S.C. § 1330(a)). It seeks confirmation of its arbitration award under the Federal Arbitration Act, 9 U.S.C. §§ 1-307, and the Inter-American Convention on International Commercial Arbitration,

done January 30, 1975, 14 I.L.M. 336, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (the "Panama Convention"). (JA 30).

In a letter dated October 29, 2010, this Court invited the United States to offer its views on "aspects of the appeal that might have implications for the conduct of the foreign relations of the United States." October 29 Letter at 1. The Court specifically noted its interest in the United States' views on the propriety of dismissing this suit on *forum non conveniens* grounds. *Id.* In particular, the Court identified two competing considerations. First, dismissal on *forum non conveniens* grounds might "run counter to U.S. treaty obligations," thereby "implicat[ing] foreign relations." *Id.* But, second, defendants contend that entertaining this suit in a U.S. court would enable Figueiredo to avoid a provision in Peruvian law limiting the amount a Peruvian governmental entity may contribute annually toward paying off any specific outstanding debt to no more than three percent of its annual budget (the "three-percent cap law"). *Id.* As the Court's letter explained, defendants argue that this apparent conflict between the maintenance of this suit and Peruvian law supports dismissal on *forum non conveniens* and international comity grounds. *Id.* at 1-2. The Court invited the United States' views on these competing considerations, "as well as any other views the United States might care to express that might assist the panel in the disposition of this appeal." *Id.* at 2.

Because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), the

United States has a significant interest in the proper application of the FSIA, a statute establishing a comprehensive and exclusive scheme for civil suits against foreign states in U.S. courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). Moreover, as the Court properly observed, the United States has a significant interest in the *forum non conveniens* and international comity issues in this case, in light of the United States' ratification of the Panama Convention.

As set forth below, the district court in this case did not properly determine whether it has subject matter jurisdiction over Figueiredo's claims against Peru and the Ministry, and there is a significant question whether it does. Accordingly, the district court's order should be vacated and remanded for reconsideration of that jurisdictional issue under the proper governing standards. Should the district court determine on remand that Peru and the Ministry are properly defendants in this suit, the district court may consider whether to dismiss this action on *forum non conveniens* grounds. However, again assuming that the district court has jurisdiction over all defendants, the United States does not believe that the district court abused its discretion in declining to dismiss this suit on those grounds or under the doctrine of international comity.

Statement of Facts

This case concerns a development program in Peru for drinking water and sanitation, which was funded in part by the Inter-American Development Bank ("IDB"). Since the beginning of the 1990s, the Peruvian Government and the IDB have worked to finance and imple-

ment a National Drinking Water and Sanitation Program. (JA 459). In negotiating its commitment to contribute funds toward that program, the IDB required the Peruvian Government to establish an "Executive Unit" with technical, administrative, and financial independence, to be responsible for the formulation, coordination, promotion, programming, administration, supervision, and evaluation of the program. (JA 460).

Accordingly, in March 1992, the Peruvian Government created an "Executive Unit" that was established as a "Special Project" of a Peruvian government ministry. (JA 460). The Executive Unit has a number of functions, including the rehabilitation of drinking water and sanitation systems operated throughout Peru, and the provision of studies and other support for water and sanitary systems. (JA 461). The Program is the current embodiment of the Executive Unit, and is established within the Ministry. (JA 460-63). In 2005, Figueiredo obtained an arbitration award of $21,607,003 against the Program in a dispute over a consulting agreement. (JA 28).

On January 18, 2008, Figueiredo brought suit under the Federal Arbitration Act in the District Court for the Southern District of New York seeking confirmation and enforcement of the arbitration award pursuant to the Panama Convention. (SPA 13 (D. Ct. Op.)); *see* 9 U.S.C. § 304. As noted above, Figueiredo named as defendants not only the Program, but also the Ministry and Peru. Figueiredo seeks to enforce the award against Peru's U.S.-based assets. The defendants filed a motion to dismiss the action, which the district court denied. (SPA 1).

In so ruling, the district court held, among other things, that (1) the Peruvian arbitration award is enforceable against all of the defendants because they are a single juridical entity; (2) although *forum non conveniens* may be considered in an action to confirm and enforce an arbitral award, dismissal of this action is not appropriate pursuant to that doctrine; and (3) dismissal is not appropriate based on grounds of international comity. The district court did not, however, expressly consider whether it had subject matter jurisdiction over this suit under any of the exceptions to foreign sovereign immunity specified in the FSIA. *Cf.* 28 U.S.C. § 1330(a). This appeal followed.

ARGUMENT

POINT I

THE DISTRICT COURT'S ORDER SHOULD BE VACATED AND THIS ACTION REMANDED BECAUSE THE COURT DID NOT PROPERLY DETERMINE WHETHER IT HAS SUBJECT MATTER JURISDICTION OVER FIGUEIREDO'S CLAIMS AGAINST PERU AND THE MINISTRY

A. The District Court Lacks Subject Matter Jurisdiction over the Claims Against Peru and the Ministry Unless the Program Is an Inseparable Part of the State

The FSIA establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against foreign states in civil cases in U.S. courts. *Amerada Hess*, 488 U.S. at 434-35. The Act provides that foreign states are immune from jurisdiction unless claims

against them fall within a statutory exception to foreign sovereign immunity. 28 U.S.C. § 1604; *see id.* §§ 1605-1607; *see also id.* § 1330 (providing for district court jurisdiction over suits against foreign sovereigns in cases in which an exception to immunity applies). "[I]f none of the exceptions to immunity applies, the court lacks both subject matter jurisdiction and personal jurisdiction." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

The only possible exception to immunity of any of the defendants in this case is § 1605(a)(6) of the FSIA, which authorizes suit "to confirm an award made pursuant to . . . an agreement to arbitrate" that is "governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Here, the parties agree that the award is governed by the Panama Convention. (SPA 13). The exception in § 1605(a)(6) thus unquestionably confers subject matter jurisdiction on the district court to consider Figueiredo's claims against the Program, which was a party to the arbitration agreement at issue in this case. However, because Peru and the Ministry were not parties to the arbitration agreement, the district court had jurisdiction over the claims against those defendants only if the Program is inseparable from the state of Peru and its Ministry. If, by contrast, the Program is a legally separate agency or instrumentality of the state, *see* 28 U.S.C. § 1603(b), there is no apparent jurisdictional basis for Figueiredo's claims against Peru and the Ministry.

Under the FSIA, a foreign state includes a foreign state's agencies or instrumentalities. *Id.* § 1603(a); *see id.* § 1603(b) (agency or instrumentality is a "separate

legal person" that is "an organ of a foreign state" and neither "a citizen of a State of the United States . . . nor created under the laws of any third country").* However, for foreign sovereign immunity purposes, the distinction between the state itself and its agencies or instrumentalities is significant. *Garb v. Republic of Poland*, 440 F.3d 579, 590 (2d Cir. 2006) (distinction between the state and its agencies or instrumentalities "pervades the FSIA"). For example, the FSIA provides greater protections to the state itself than to a state's agencies or instrumentalities, principally in the contexts of the availability of punitive damages and in attachment or execution proceedings. *Id.* (citing 28 U.S.C. §§ 1606, 1610(b)(2)); *see, e.g.*, *Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (assets of an agency or instrumentality generally cannot be used to satisfy the judgments against that state). The Supreme Court has instructed that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 627 (1983).

The district court here erred in its analysis of the Program's status. *See Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (district court's ruling on FSIA subject matter jurisdiction reviewed for clear error with respect to factual findings and *de novo* with respect to legal conclusions). As noted, the FSIA is jurisdictional. In analyzing the

---

* The FSIA concept of an "agency" is thus very different from the common understanding of what is an "agency" of the United States government.

Program's status, the district court "accept[ed] the material facts alleged in the complaint as true." (SPA 4). In considering a motion to dismiss at the pleading stage, for either failure to state a claim (Rule 12(b)(6)) or for lack of subject matter jurisdiction (Rule 12(b)(1)), courts generally accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See Sharkey v. Quarantillo*, 541 F.3d 75, 82-83 (2d Cir. 2008) (Rule 12(b)(1)); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009) (Rule 12(b)(6)). However, the plaintiff "bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists."*

---

* Some courts, including this one, have described the determination of whether a claim comes within an FSIA exception to immunity as involving a three-step, burden-shifting process. *Virtual Countries*, 300 F.3d at 235-41 (citing *Cargill*, 991 F.2d 1012). Under that process, the defendant must present a *prima facie* case that it is a foreign sovereign. *Id.* at 241. The plaintiff then bears the burden of going forward with evidence showing that an exception to immunity applies. *Id.* The court then resolves any factual disputes, placing the ultimate burden of persuasion with the foreign state. *Id.*

The burden-shifting process is based on a comment in the FSIA's legislative history suggesting that, because a foreign state's immunity is an "affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity." H.R. Rep. No. 94-1487, at 17 (1976); *see Cargill*, 991 F.2d at 1016 (citing

APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003) (quotation marks omitted). Accordingly, "[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Id.* (quotation marks omitted). In determining their jurisdiction, district courts "are permitted to look to materials outside the pleadings." *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010).

Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n.6 (5th Cir. 1989) (citing House Report)). However, the Supreme Court has unequivocally held that the FSIA's exceptions to immunity are jurisdictional requirements, not affirmative defenses. *E.g.*, *Amerada Hess*, 488 U.S. at 434 ("[Section] 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity."). While it therefore could be argued that it is always the plaintiff's burden of persuasion to establish that a claim against a foreign state comes within an enumerated exception to foreign sovereign immunity and that the district court therefore has jurisdiction, the lower court here has employed neither of these standards. *Cf. St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) ("It is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction, in view of the nature of the right asserted, and, if appropriately challenged, or if inquiry be made by the court of its own motion, to support the allegation.").

The district court here does not appear to have placed the burden of establishing the court's jurisdiction on the plaintiff. Instead, the district court considered whether the Program is an integral part of Peru and the Ministry under the "failure to state a claim" standard set forth in Rule 12(b)(6). (SPA 4). Applying this erroneous standard, the district court analyzed the issue of whether the Program has a legal identity separate from Peru by "accept[ing] the material facts alleged in the complaint as true and construe[ing] all reasonable inferences in plaintiff's favor." (SPA 4; *see also* SPA 12 (denying motion to dismiss for "failure to state a claim")).

The district court's error was significant. Because it "construe[ed] all reasonable inferences in plaintiff's favor," the district court could well have resolved ambiguities under a Rule 12(b)(6) standard, and it may have given insufficient weight to evidence provided by Peru on critical issues such as the Program's separate juridical status under Peruvian law, the Program's financial independence from the Ministry, the Ministry's obligation to pay the arbitral award, and the character of the functions performed by the Program. (*Compare, e.g.*, SPA 11 ("[I]t is clear that the Program's assets are not distinct from those of the Republic.") *with* SPA 7 ("The economic and financial resources of the Program consist of: (1) loan contracts; (2) allocations by the Annual Budget for the Public Sector Act and from the Public Treasury; (3) transfers or donations; and (4) assets available to the Executive Unit of the National Drinking Water and Sanitation Program at the time it was granted status as a Special Project.")). These are jurisdictional matters because if the Program is an agency or instrumentality of Peru rather than an

inseparable part of the state, there is no apparent jurisdictional basis in the FSIA for Figueiredo's claims against Peru or the Ministry, given that the arbitration award is against the Program alone.

This error also may have caused the district court to improperly limit the information it considered when determining whether Figueiredo's claims against Peru and the Ministry fall within the FSIA's arbitration exception in § 1605(a)(6). Although an analysis for failure to state a claim is limited to the pleadings and documents they incorporate by reference, *Int'l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 2002), an inquiry into subject matter jurisdiction requires a court to consider evidence outside the pleadings when necessary to resolve jurisdictional issues, *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998). If the district court had properly performed a subject matter jurisdiction analysis it may have required additional submissions from the parties on important factual issues regarding the function of the Program and its status as a possible agency or instrumentality.*

---

* The district court did not strictly apply a "failure to state a claim" analysis, because it did consider some matters outside the pleadings in deciding the motion to dismiss, focusing, in particular, on an expert declaration submitted by the defendants that addressed various issues of Peruvian law and a factual history of the Program. (SPA 6-8). Nevertheless, the district court's opinion is clear that it intended to apply a Rule 12(b)(6) standard to the motion, under which it would accept plaintiff's factual allegations as true and draw

The defendants provided some reason to believe that the Program is a separate "agency or instrumentality" of Peru under the FSIA. They showed, for example, that, as an "Executive Unit" pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, make payments, and propose budgets (JA 456-57), as well as enter into contracts without participation of any official outside of the Program (JA 1025). *See* 28 U.S.C. § 1603(b) (defining "agency or instrumentality of a foreign state" as an entity that, among other things, is "a separate legal person"); H.R. Rep. 94-1487, at 15 (1976) (a state entity is a "separate legal person" provided that "under the law of the foreign state where it was created, [it] can sue or be sued in its own name, contract in its own name or hold property in its own name"); *Garb*, 440 F.3d at 591. The district court therefore should not have employed a Rule 12(b)(6) standard in deciding whether the Program is actually an inseparable part of Peru and the Ministry.

Ultimately, it is difficult to determine on this record whether the district court would have determined that the Program is a separate agency or instrumentality or instead an integral part of the state had it applied the correct legal standard. For that reason, the district

---

inferences in the plaintiff's favor. (*E.g.*, SPA 4). Thus, it could well have resolved ambiguities in favor of the plaintiff rather than in favor of a determination that the Program is a separate agency or instrumentality of Peru.

court's order should be vacated and the case remanded for reconsideration under the governing principles.*

B. Considerations Relevant to Determining the Program's Status

On remand, the district court's starting point must be the FSIA's definition of an "[a]gency or instrumentality of a foreign state." 28 U.S.C. § 1603(b). A governmental entity is an agency or instrumentality if it "is a separate legal person, corporate or otherwise" that is "an organ of a foreign state" and neither "a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.*

Of the three criteria listed in § 1603(b)'s definition of "agency or instrumentality," there is no dispute that the second and third are met here; the only question is whether the Program is a "separate legal person" under § 1603(b)(1). In considering whether a foreign govern-

---

* In *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 398-400 (2d Cir. 2009), this Court held that foreign states are not "persons" entitled to the protections of the due process clause. If the district court determines on remand that the Program is a separate agency or instrumentality of Peru, it will then have to address whether foreign state agencies or instrumentalities enjoy constitutional due process protection, a question *Frontera* left open. *Id.* at 401. If the court determines that the Program does enjoy constitutional due process protection, it will then have to determine whether the Program has sufficient contacts with the forum for the court to exercise personal jurisdiction over it.

mental entity is a "separate legal person" under the FSIA, a court should consider the entity's legal characteristics, such as its ability to litigate, contract, and hold property in its own name. *Garb*, 440 F.3d at 597 n.24; *see id.* at 591 (whether an entity is a "separate legal person" involves an inquiry into " 'whether the entity is treated as a separate legal entity under the laws of the foreign state.' " (quoting *Magness v. Russian Federation*, 247 F.3d 609, 613 n.7 (5th Cir. 2001))). But the entity's legal characteristics are not determinative. *Id.* at 597 n.24. If the entity constitutes such a critical part of the state that it would be inappropriate to treat it as a separate agency or instrumentality (and so subject to the lesser protections the FSIA generally provides to agencies or instrumentalities), the entity conducts a "core function" of the state and is not a separate legal person, even if other indicia (such as administrative or financial independence from the state) suggest that the entity might be separate. For example, a ministry of defense or an air force might exhibit some independence, tending to support a determination that they are agencies or instrumentalities. Yet those entities are so central to the identity of the state itself, it would be inappropriate to treat them as anything but the state. *See, e.g.*, *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994).

Accordingly, this Court has adopted the "core functions test" to help determine whether a governmental entity is a "separate legal person" for purposes of determining subject matter jurisdiction under the FSIA's definition of agency or instrumentality. *Garb*,

440 F.3d at 590-94.* Under that test, courts consider whether the "core functions" of the entity are "predominantly governmental." *Id.* at 594 (quotation marks omitted). If so, the entity is an "integral part of a foreign state's political structure" and thus part of the state itself; in contrast, if those core functions are non-governmental, the entity is a separate legal person under § 1603(b)(1). *Id.* at 590-94.

Peru has presented reasons to believe that the Program is a separate legal person within Peru's political structure. Peru showed, for example, that its agreement with the IDB required it to establish the Program with technical, administrative, and financial independence. (JA 460). Peru also showed that as an "Executive Unit" pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, and make payments (JA 456-58), as well as enter into contracts without participation of any official outside of the Program (JA 1025). These are common characteristics of an "agency or instrumentality" under the FSIA rather than an inseparable part of the state, such as the role served by a military air force. *See* H.R. Rep. No. 94-1487, at 15 (1976) (a state entity is a "separate legal person" provided that "under the law of the foreign state where it was created, [it] can sue or be sued in its own name, contract in its own name or hold property in its own name"); *see also id.* at 15-16 ("As a

---

* The *Garb* opinion therefore answers the choice of law question this Court left open in *Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Federation*, 361 F.3d 676 (2d Cir. 2004), a case that presented issues similar to those here.

general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms.").

The district court should also consider whether the Program's core functions are governmental such that it is an inseparable part of the state, like a state's air force or central government ministry. *See Garb*, 440 F.3d at 594 (Ministry of the Treasury of Poland performs core governmental function); *Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Federation*, 361 F.3d 676, 677-78 (2d Cir. 2004) (Government of Russia performs core governmental function); *Transaero*, 30 F.3d at 153 (Bolivian Air Force performs a core governmental function). In this respect, the district court erred in believing that this Court's decision in *Noga* controlled. (SPA 8).

In *Noga*, this Court held that the Government of Russia and the Russian Federation were one juridical entity for purposes of arbitration-confirmation proceedings. 361 F.3d at 678. Pursuant to the Russian Constitution, the Russian Government constitutes one half of the federal executive. *Id*. at 685. Among its other powers, the Russian Government was responsible for setting a federal budget, and "decrees and orders" issued by the Government of Russia were " 'binding throughout the Russian Federation.' " *Id.* (quoting Russian Constitution Art. 115(1)). Any assets of the Government of Russia to satisfy a judgment confirming any arbitral award were "owned by the Russian Federation." *Id.* at 688. Thus, in *Noga* the Government of Russia self-evidently was a central government entity, performed a governmental function, and thus had no

juridical status separate from that of the Russian Federation.

The same cannot be said for the Program, whose functions are limited to providing water and sanitation. The Program does not have any authority to set a federal budget, set monetary policies, or issue decrees that bind Peru as a whole. It has no authority or purpose outside its objective of providing clean water for Peru's citizens, and has its own budget within the Ministry.

In deciding whether the Program performs a core governmental function, the district court should consider that the Program's principal function—the provision of a basic public utility—is not invariably governmental. In New York City, for example, potable water is provided by a governmental corporation, but electricity is provided by a regulated private company. *See* http://www.nyc.gov/html/nyw/html/aboutus.html; http://www.coned.com/aboutus. Nevertheless, the Program's apparently non-commercial nature is a relevant consideration. Under the core functions test, a commercial enterprise is more likely to be a separate agency or instrumentality, *see Garb*, 440 F.3d at 591, while a generally non-commercial body is more likely to be an integral part of the state. While relevant, however, the non-commercial nature of an entity is not itself determinative. Similarly, the nature of the specific activity that is the subject of suit should not be the court's primary focus in determining whether the entity being sued is the state or an agency or instrumentality of the state, as both are capable of engaging in commercial activity.

As described above, the "core functions" test is part of the determination of whether an entity is the agency or instrumentality of a state. In a separate context, the Supreme Court has applied an "alter ego" test to determine if an agency or instrumentality of a state can be liable for the state's acts, holding that it may when the entity is so controlled by the state as to create a principal-agent relationship, where corporate form has been abused, or when recognizing the putative separation between the state and the entity would work fraud or injustice. *Bancec*, 462 U.S. at 629; *Letelier*, 748 F.2d at 794. In *Bancec*, however, the governmental entity's status as an agency or instrumentality was not in dispute, and the issue was whether such an instrumentality could be held liable for the acts of its parent state, which was not a party to the litigation. Thus, as this Court has recognized, the alter ego test is "of little help" in determining "*whether* [an entity] is an instrumentality established as a juridical entity distinct and independent from the [state]." *Noga*, 361 F.3d at 685.

This Court and others have occasionally applied an alter ego test in the jurisdictional context to establish jurisdiction over one state entity based on the actions of a putatively separate entity. *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 179-80 (2d Cir. 2010); *United States Fidelity & Guaranty Co. v. Braspetro Oil Servs Co.*, 199 F.3d 94, 98 (2d Cir. 1990); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). Under this Court's precedent, *Bancec* may be relevant to the jurisdictional inquiry in extraordinary circumstances, where respecting the juridical independ-

ence of an agency would work fraud or injustice. However, nothing in the present record appears to approach the high barrier imposed by the *Bancec* test. In particular, the district court here erred in concluding that any presumption of separateness the Program enjoys is overcome under the considerations identified in *Bancec*. The factors cited by the district court—that "final payment" of the award is the Ministry's responsibility and that the Program's budget is subject to authorization by the Ministry of Economy and Finance (SPA 11)—are insufficient to establish a principal-agent relationship, abuse of the corporate form, or fraud. Therefore, absent additional evidence that recognizing the Program's separate status (if any) would be inappropriate, the "core functions" test of *Garb* is sufficient to determine the jurisdictional issue in this case.

For these reasons, this Court should vacate the district court's order denying the defendants' motion to dismiss, and remand for further consideration of whether the Program is an agency or instrumentality, or instead an integral part of Peru and the Ministry. If the Program is a separate agency or instrumentality, the district court will need to consider whether it had subject matter jurisdiction over the claims against Peru and the Ministry, because Figueiredo's arbitration award is against the Program alone.

POINT II

FORUM NON CONVENIENS IS GENERALLY AN AVAILABLE GROUND FOR DISMISSAL OF AN ACTION UNDER THE PANAMA CONVENTION, BUT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THIS CASE

A. *Forum Non Conveniens* May Properly Be Considered in an Action to Confirm and Enforce a Foreign Arbitral Award

The district court correctly held that *forum non conveniens* is an available ground for dismissal in proceedings brought pursuant to the Panama Convention. (SPA 18); *accord In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine* ("*Monde Re*"), 311 F.3d 488 (2d Cir. 2002) (applying *forum non conveniens* analysis in confirmation and enforcement proceedings brought under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention")). Assuming the district court had subject matter jurisdiction over Figueiredo's claims against Peru and the Ministry, the district court did not abuse its discretion in declining to dismiss this suit on the basis of *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (a district court's *forum non conveniens* determination is reviewed for a "clear abuse of discretion").

Article 4 of the Panama Convention provides that "execution and enforcement" under the Convention should occur "in accordance with the procedural laws of

the country where it is to be executed." Panama Convention Art 4. As the Supreme Court has explained, the doctrine of *forum non conveniens* is among the "procedural laws" of general applicability in the United States. *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (*forum non conveniens* is "procedural rather than substantive"). *Forum non conveniens* is therefore properly considered pursuant to Article 4 of the Convention.*

Under the governing standard, in considering whether dismissal on *forum non conveniens* grounds is appropriate, "a court determines the degree of deference properly accorded the plaintiff's choice of forum" and "whether the alternative forum proposed by the defen-

---

* A court may dismiss a suit on *forum non conveniens* grounds without first verifying that it has subject matter jurisdiction. *Sinochem v. Malaysia Int'l Shipping*, 549 U.S. 422, 425 (2007). However, the *forum non conveniens* analysis in this case may vary depending on whether Peru—the only defendant with assets in New York—is a proper defendant to this action, which is a question of subject matter jurisdiction. *See supra* Point I. Accordingly, unlike in *Sinochem*, in this case "considerations of convenience, fairness, and judicial economy" do not weigh in favor of analyzing *forum non conveniens* prior to considering subject matter jurisdiction. *Sinochem*, 549 U.S. at 432. Moreover, assuming that the Program is an inseparable part of Peru and the Ministry, the United States does not believe that dismissal on *forum non conveniens* grounds would be appropriate. Thus, the district court should not bypass the jurisdictional question.

dants is adequate to adjudicate the parties' dispute," and then "balances the private and public interests implicated in the choice of forum." *Norex Petroleum Ltd. v. Access Indus.*, 416 F.3d 146, 153 (2d Cir. 2005). In the United States' view, the determinative consideration in this case, and one that implicates U.S. policy interests, is the balancing of the public and private interest factors. Even assuming the availability of another adequate forum and that Figueiredo's choice of forum should get little if any weight, the public policy interest in favor of enforcing arbitral awards under the Panama Convention weighs heavily against dismissal here.

B. Public Interest Factors

The "public interest" factors a court should consider in performing *forum non conveniens* balancing concern the forum's interest in adjudicating the case, as well as the burdens that would flow from entertaining the suit. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

The United States has a significant interest in allowing U.S. courts to enforce international arbitration awards pursuant to the Panama Convention, as the district court recognized. (SPA 22). Accordingly, the public interest factors will generally weigh against *forum non conveniens* dismissal and the doctrine should only be employed to dismiss an action if compelling countervailing interests are present. In recommending ratification of the Panama Convention, the Deputy Secretary of State observed that "[a]rbitration agreements have become an increasingly prevalent feature of international commercial transactions, as parties have sought the advantages of efficiency and flexibility

which arbitration can provide." S. Treaty Doc. No. 97-12, at 3 (1981). The State Department also determined that "[t]he recognition and enforcement of international arbitration agreements and awards by national courts, as provided for in this Convention, is necessary to support this development." *Id.*; *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting that the New York Convention evinces a "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes").

If on remand the district court here finds that there is subject matter jurisdiction over Figueiredo's claims against Peru and the Ministry, the presence of Peru's assets in New York provides strong support for the district court's decision not to grant dismissal under the doctrine of *forum non conveniens*. A purpose of the Panama Convention was not only to permit "recognition" of foreign arbitration awards, but also to facilitate "execution" of such awards "in the same manner as that of decisions handed down by national or foreign ordinary courts." Panama Convention, Art. 4. Congress implemented this provision by directing that foreign arbitration awards "shall . . . be recognized *and enforced* under" the Federal Arbitration Act. 9 U.S.C. § 304 (emphasis added); *cf.* 28 U.S.C. § 1606 (where an exception to foreign sovereign immunity exists, a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances"). Congress's evident intent was thus to permit those with foreign arbitration awards to enforce those awards against assets that may be within the jurisdiction of United States courts. Indeed, the very point of registering and enforcing an arbitration award

in a foreign forum is to satisfy the award with the debtor's assets located in the forum.

On the other hand, this Court has held that considerations of international comity are relevant to the weighing of public interest factors in *forum non conveniens* analysis. *Blanco v. Banco Industrial de Venezuala, S.A.*, 997 F.2d 974, 983 (2d Cir. 1993). Accordingly, another relevant public interest factor may therefore be the Peruvian three-percent cap law, which Peru argues provides an independent basis to dismiss this action. Appellants' Br. 54-56. In this case, however, considerations of international comity should not carry much weight in the *forum non conveniens* balancing because, as described in more detail below, Peru's comity argument is undermined by the lack of demonstrated direct conflict between Peruvian law and these confirmation and enforcement proceedings. *See infra* Point III.

Other relevant public interest factors include "administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law." *Monde Re*, 311 F.3d at 500 (citing *Gilbert*, 330 U.S. at 508-09). These factors do not weigh strongly against adjudication in this case. The district court did not raise any concerns of court congestion, and FSIA litigation is conducted without a jury. 28 U.S.C. § 1330(a). Any interest Peru had in adjudicating this matter in Peru is outweighed by the United States' interest in enforcing arbitration awards and the presence of Peruvian assets in New York. And while the

district court may have to consider some aspects of Peruvian law in determining the Program's status, that is not uncommon in FSIA litigation. Moreover, U.S. law, not Peruvian law, controls whether to enforce the arbitration agreement.

C. Private Interest Factors

The "private interest" factors that a court should consider in a *forum non conveniens* analysis include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make a trial of a case easy, expeditious and inexpensive." *Monde Re*, 311 F.3d at 500.

The record in this case already contains evidence from Peru's expert concerning the Program's status. Although, as described above, the district court's assessment of subject matter jurisdiction may require additional evidence and fact finding, the challenges faced by the parties in presenting such evidence do not generally weigh in favor of dismissal on *forum non conveniens* grounds. U.S. courts have routinely considered the same jurisdictional question presented here, *i.e.*, whether governmental entities are agencies or instrumentalities of a foreign state, based on evidence submitted by the parties. *See, e.g.*, *Garb*, 440 F.3d at 591; *Noga*, 361 F.3d at 684-90. Where "extensive discovery" and a probable "trial of the factual issues implicating and establishing" the liability of a non-signer to an arbitration agreement are necessary, the private interest factors may be substantial. *Monde Re*, 311 F.3d at 500. But even then, those considerations

would have to be weighed against the strong public interest in enforcing international arbitration agreements under an applicable treaty, especially where the debtor has assets in the forum in which registration and enforcement is sought.

In this case, there is no indication that the burden on the parties to present evidence regarding the legal relationship between the Program and Peru and the Ministry will be so extensive as to conclude that the district court abused its discretion in denying *forum non conveniens* dismissal.

POINT III

PRINCIPLES OF INTERNATIONAL COMITY DO NOT REQUIRE DISMISSAL

Finally, the district court did not abuse its discretion in declining to dismiss this suit based on principles of international comity. *See Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (district court's determination concerning dismissal on international comity grounds reviewed for abuse of discretion). Peru has not established that confirmation and enforcement of the arbitral award in U.S. courts would clearly conflict with Peruvian law. Moreover, declining confirmation and enforcement in this case would also be inconsistent with United States policy favoring international arbitration.

As the Supreme Court has explained, dismissal on comity grounds because of a conflict with foreign law is only appropriate where a "true conflict between domestic and foreign law" exists, *i.e.*, where it is not possible to comply with the laws of two states. *Hartford Fire Ins.*

Co. v. California, 509 U.S. 764, 798-99 (1993); *In re Maxwell Communication Corp*, 93 F.3d 1036, 1049 (2d Cir. 1996). International comity is not a rule of law, but rather is a "rule of practice, convenience, and expediency." *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (quotation marks omitted).

Although the record is not well developed on this point, Peru has not established any "true conflict" between Peruvian law and the enforcement of arbitral awards against Peru's assets in New York. Peru argues that confirmation and enforcement would conflict with its law limiting the annual amount of an adverse judgment that a Peruvian governmental entity may pay to three percent of the entity's budget. Appellants' Br. 54. However, that provision does not appear to prohibit Figueiredo from satisfying the arbitral award through payments from the proceeds of bond offerings by Peru in New York and commercial accounts held by Peru in New York. Indeed, although as it was originally written, the three-percent cap law stated that Peruvian government debts could be paid "only and exclusively" by the governmental entity that incurred the debt, the phrase "only and exclusively" was later declared unconstitutional by the Peruvian courts, and was struck from the law. (JA 484-85). Peru therefore has not identified a conflict of the sort that would justify a determination that the district court abused its discretion in declining to dismiss the suit on international comity grounds.

The strong United States policy interests in promoting confirmation and enforcement of arbitral awards covered by treaties to which the United States is a

party and of promoting international arbitration also weigh against dismissal on the grounds of international comity. *See supra* Point II.B. Ultimately, this strong policy interest, coupled with Peru's failure to identify any direct conflict between these proceedings and Peruvian law, indicate that the district court did not abuse its discretion when it declined to dismiss this action.

CONCLUSION

The judgment of the district court should be vacated and this case remanded for further consideration of the issues set forth in this amicus brief.

Dated: New York, New York
February 25, 2011

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for Amicus Curiae United States of America.

AMY A. BARCELO,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

TONY WEST,
Assistant Attorney General

DOUGLAS N. LETTER,
LEWIS S. YELIN,
Attorneys, Appellate Staff
Civil Division
Department of Justice

HAROLD HONGJU KOH,
Legal Adviser,
Department of State

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6991 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: AMY A. BARCELO,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: Figueiredo Ferraz v. Peru

Docket Number: 09-3925-cv(L)

I, Louis Bracco, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 2/25/2011) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: February 25, 2011

CERTIFICATE OF SERVICE

09-3925-cv(L) Ferraz v. Peru

I hereby certify that one copy of this Brief for The United States of America as *Amicus Curiae* in Support of Vacatur and Remand was sent by Regular First Class Mail and Electronic Mail to:

Thomas J. Hall
Robert E. Grossman
Paige M. Willan
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112

Attorney for Plaintiff-Appellee Figueiredo Ferraz E Engenharia de Projeto LTDA

Juan C. Basombrio
Mark S. Sullivan
Dorsey & Whitney LLP
250 Park Avenue
New York, NY 10177

Attorney for Defendants-Appellants The Republic of Peru, Ministerio de Vividenda, Construccion y Saneamiento, Programa Agua Para Todos (PAPT)(successor by integration to Programa De Apoyo A La Reforma Del Sector Saneamiento (PARSSA), formerly known as Proyecto Especial Programa Nacional De Agua Potable & Alcantarillado (PRONAP))

I also certify that the original and five copies were also shipped via Hand delivery and Electronic Mail to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576
civilcases@ca2.uscourts.gov

on this 25th day of February 2011.

Notary Public:

_____

Sworn to me this

February 25, 2011

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

_____

SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949